

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 11, 2004

WILLIAM G. ALLEN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 86-S-1256 Frank G. Clement, Jr., Judge

No. M2003-01786-CCA-R3-HC - Filed August 25, 2004

The Appellant, William G. Allen, appeals the summary dismissal of his petition for writ of habeas corpus. On appeal, Allen argues that his seventy-eight-year sentence for first degree murder is “void and illegal,” as the trial court lacked jurisdiction to sentence him under a statute that had been repealed. The trial court summarily dismissed the petition finding that: (1) this was not Allen’s first petition for habeas relief; (2) Allen’s sentences had not expired; and (3) this issue has been previously determined on direct appeal. After review, we conclude that, although the jurisdictional issue is without merit, Allen’s sentence was not imposed in accordance with the applicable statute for first degree murder and it is, therefore, illegal. Accordingly, habeas corpus relief is granted, and this case is remanded for entry of a corrected sentence in accordance with this opinion.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed in Part;
Reversed in Part and Remanded**

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the Appellant, William G. Allen.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Helena Walton Yarbrough, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and James Sledge, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The following chronology of facts and law relevant to this case are noted:

1. On January 16, 1968, the Appellant and others murdered two Nashville Metro police officers. *State v. William Garrin Allen*, No. 01-C-01-9006-CR-00151 (Tenn. Crim. App. at Nashville, Sept. 24, 1991), *perm. to appeal denied*, (Tenn. 1992).

2. On March 18, 1968, a presentment was returned charging the Appellant with two counts of common law premeditated first degree murder, as codified in Tennessee Code Annotated section 39-2402.

3. In 1968, when this offense was committed, the statute which prescribed the punishment for first degree premeditated murder permitted a sentence of death, imprisonment for life, or a term over twenty years, as the jury determined. Tenn. Code Ann. 39-2405.

4. In 1968, following a jury trial, the Appellant and two co-defendants were convicted of the murder of Officer Thomasson, and the Appellant was sentenced to a term of ninety-nine years. *Canady v. State*, 461 S.W.2d 53, 55-56 (Tenn. Crim. App. 1970).

5. In 1974, before the Appellant could be tried for the murder of the second officer, he escaped from the state penitentiary and remained at large until 1986.

6. In 1973, in response to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972), the Tennessee General Assembly repealed the existing penalty provisions for first degree murder and enacted a new section 39-2405.

7. In February 1974, the Tennessee Supreme Court held that the 1973 Act was invalid, as it embraced more than one subject and was broader than its title. *State v. Hailey*, 505 S.W.2d 712, 715 (Tenn. 1974).

8. In 1974, the General Assembly enacted Chapter 462 of the Public Acts of 1974, which provided that all persons convicted of first degree murder would receive the death penalty.

9. In 1977, the Tennessee Supreme Court, applying federal constitutional principles, declared the 1974 death penalty statute unconstitutional. *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977). The ruling in *Collins* revived the non-capital sentencing provisions of the 1919 Act for those convicted of first degree murder and invalidated all death penalty provisions back to the 1919 Act.

10. In 1979, the Tennessee Supreme Court, in *Miller v. State*, 584 S.W.2d 758 (Tenn. 1979), overruled *Collins*, thereby reviving the 1915 Act prescribing the punishment for first degree murder. The court in *Miller* concluded that the 1919 Act was not applicable, as elision of the death penalty was not permitted in the absence of a severability clause. *Id.* at 765. The case held that the only

punishment for a defendant convicted of first degree murder before the effective date of the 1977 Act was a sentence of life imprisonment. *Id.* at 762.

11. In 1989, the Appellant was tried and convicted for the first degree murder of the second police officer, Officer Johnson, and was sentenced to seventy-eight years, to be served consecutively to his ninety-nine year sentence. *William Garrin Allen*, No. 01-C-01-9006-CR-00151.

12. On September 24, 1991, the Appellant's conviction was affirmed by a panel of this court on direct appeal. *Id.* This court found that the trial court had jurisdiction based upon the saving statute which was applicable at the time, Tennessee Code Annotated section 39-1-105.

13. On March 21, 2003, the Appellant filed the instant *pro se* petition for writ of habeas corpus in the Davidson County Criminal Court alleging that the trial court lacked jurisdiction to sentence him pursuant to the first degree murder statute under which he was convicted and that his sentence was void and illegal.

14. The trial court, finding the petition deficient on three grounds, summarily dismissed the petition, and this appeal followed.

Analysis

In Tennessee, habeas corpus relief is only available when a judgment is void because the convicting court was without jurisdiction or authority to sentence a defendant or if a defendant's sentence has expired and he is being illegally restrained. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). In other words, habeas corpus relief will only be granted where the petition shows that the judgment is "void" and not merely "voidable." *McLaney v. Bell*, 59 S.W.3d 90, 92 (Tenn. 2001) (citing *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999)). The petitioner bears the burden of establishing that the judgment is "void." *Id.* (citing *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000); *State ex rel Kuntz v. Bomar*, 281 S.W.2d 290, 291-92 (Tenn. 1964)). That burden entails showing that the jurisdictional defect appears in the record of the original trial, thereby creating a void judgment. *Id.* (citing *State v. Ritchie*, 20 S.W.3d 624, 630 (Tenn. 2000)). A sentence "imposed in direct contravention of a statute . . . is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000). Where the allegations in a petition for writ of habeas corpus do not demonstrate that the judgment is void, a trial court may correctly dismiss the petition without a hearing. *McLaney*, 59 S.W.3d at 93 (citing Tenn. Code Ann. § 29-21-109 (2003); *see, e.g., Archer*, 851 S.W.2d at 164 (parenthetical omitted)).

In this case, the trial court summarily dismissed the habeas corpus petition finding that: (1) the Appellant had filed previous habeas corpus petitions relating to this conviction; (2) the petition was premature because the Appellant's 1968 ninety-nine year sentence had not yet expired; and (3) *res judicata* precluded review because the issue had previously been ruled upon by the Court of Criminal Appeals on direct appeal.

With regard to the first ground, the record shows that the Appellant has previously filed numerous federal writs for habeas corpus relief, however, this was the Appellant's first application for relief in the state court. State and federal habeas corpus petitions are distinctly different and serve different purposes. *See Harries v. State*, 958 S.W.2d 799, 803 n.2 (Tenn. Crim. App. 1997). The State concedes that the court erred in determining that the petition was deficient on this ground, and we agree.

Second, the Appellant acknowledges that his ninety-nine-year sentence has not yet expired. He argues only that his sentence is "void and illegal."

With regard to the third ground, the trial court found this issue was previously determined for the following reason:

The opinion of the Court of Criminal Appeals provided by [the Appellant] reveals that the issue before this Court was previously ruled upon by the appellate court. In that opinion, the Court of Criminal Appeals stated:

Allen contends that the trial court was without jurisdiction to try him, because the First Degree Murder statute under which he was originally charged had been repealed. He argues that prosecution under the replacement statute would violate the *ex post facto* concept found in Article I, Section 9, Clause 3 of the U.S. Constitution and Article I, Section 11 of the Tennessee Constitution. We disagree.

The case of *Stinson v. State*, 344 S.W.2d 369, 372 (Tenn. 1961) states the controlling rule as being:

The repeal of a penal statute pardons all offenses committed before the repeal, unless there is a saving provision which perpetuates the right to prosecute under the original statute.

The saving statute in effect at the time of this trial was T.C.A. Section 39-1-105.¹

In his petition, the Appellant alleges:

Petitioner's sentence is illegal, void. The trial court lacked jurisdiction in 1989 to sentence him under first degree murder punishment statute Chapter 5, Public Act 1919 . . . or under Chapter 181 Public Act 1915, as a result of Chapter 5 being held

¹ Although the Appellant relied upon *Miller* in his direct appeal, no analysis of the case was conducted by this court. Moreover, we would note that, although the Appellant raised a jurisdictional challenge to his conviction, the issue of a "void or illegal sentence" was not raised.

unconstitutional in toto by Tennessee Supreme Court in *Miller v. State*, 584 S.W.2d 758 (1979) . . . ten years before his 1989 trial and conviction and by the express repeal of Chapter 181 Public Act 1815 under Chapter 4 Public Act 1919.

The Appellant correctly asserts that the supreme court in *Miller* found the 1919 Act unconstitutional and, in its place, revived the 1915 Act for sentencing those convicted of first degree murder. It is the Appellant's position, however, that the 1915 sentencing act is also inapplicable² to his 1989 first degree murder conviction. His argument is two-fold.

First, he contends that the 1915 Act did not abolish the death penalty in its entirety as a punishment for first degree murder. As authority, he cites the language of the 1915 Act which contains the exception, "that the provisions of this Act shall not apply to convicts serving life terms in the state penitentiary who shall be convicted of any offense, now punishable under the law by death by electrocution." 1915 Tenn. Pub. Acts, ch. 181. Because the Appellant was already "serving a version of life imprisonment" at the time of his second conviction, he argues the exception provisions of the 1915 Act made him eligible for a sentence of death. Accordingly, he contends the 1915 Act is also unconstitutional. With regard to this argument, we would note that the Appellant, at the time of his second conviction, was serving a ninety-nine year sentence, not a life sentence. Therefore, this argument is without merit.

Second, he argues that the supreme court in *Miller* was without authority to reinstate an act which had expressly been repealed by legislative act. He asserts that because the Act had been repealed, as opposed to a repeal by implication or by amendment, there was nothing for the court to revive. As authority, he cites *Haynes v. McKenzie Memorial Hospital*, 667 S.W.2d 497, 498-99 (Tenn. App. 1984), for the holding that "once a code section has been effectively repealed, its reenactment may be accomplished only by positive reenactment in constitutional form." Thus, he argues that the 1915 Act is inapplicable because once repealed, nothing remained. Based upon these arguments, the Appellant asserts that the proper remedy is that he "should be, by default, convicted of second degree murder and/or given twenty (20) years, the maximum sentence under previous statutes."

²The Appellant at times within his petition and on appeal appears to challenge his 1968 sentence of ninety-nine years. However, the focus is clearly upon his 1989 conviction and resulting seventy-eight-year sentence, which was ordered to be served consecutively. Moreover, the case number referenced on the Appellant's habeas corpus petition is No. 86S-1256, which is his 1989 conviction for first degree murder.

Irrespective of whether the 1968 conviction is challenged, a sentence imposed in accordance with the statute in effect at the time of its imposition is not void merely because the statute is later declared unconstitutional. Such a sentence is instead voidable if timely challenged in a post-conviction proceeding. *Taylor v. State*, 995 S.W.2d 78, 86 (Tenn. 1999). At the time the offense was committed in 1968, the jury was authorized to impose a sentence of death, life imprisonment, or a term over twenty years pursuant to Tennessee Code Annotated section 39-2405. This sentencing provision remained valid until it was declared unconstitutional in *Miller* in 1979. Because the ninety-nine-year sentence is voidable, as opposed to void, it is not reviewable in a petition for habeas corpus relief.

Our supreme court held in *Miller* that the legally effective punishment for first degree murder on the date of the crime, January 16, 1968, was life imprisonment pursuant to Chapter 181 of the 1915 Act. *Miller*, 584 S.W.2d at 762. As this court noted in *State v. Jefferson*, 938 S.W.2d 1, 21 (Tenn. Crim. App. 1996), *perm. to appeal denied*, (Tenn. 1996), in an almost identical issue, this court as an intermediate court, is bound by the supreme court's decision in *Miller*. Accordingly, we find that the Appellant's issue that the trial court was without jurisdiction is ill-founded.

Notwithstanding our conclusion that the trial court in 1989 had jurisdiction to impose a sentence for first degree murder under the 1915 Act, we are constrained to note that the sentence as fixed by the jury failed to comport with the Act and was, thus, illegal.³ As previously noted, the supreme court concluded in *Miller* that the exclusive punishment for first degree murder on the date of this offense, January 16, 1968, was that of a sentence of life imprisonment under the 1915 Act.⁴ The trial record in this case reflects that the trial judge apparently charged the jury under the non-capital sentencing provisions in effect in 1968 for first degree murder, as opposed to the 1915 Act, resulting in a determinate sentence of seventy-eight years. As the holding in *Miller* had been in effect at the time for ten years, clearly, this sentence is illegal.

It has long been the law in this state that "where the verdict in a criminal case is not warranted by law no valid judgment can be rendered on it." *Alexander v. State*, 225 S.W.2d 254, 255 (Tenn. 1949) (citing *State v. Ragsdale*, 78 Tenn. 671 (Tenn. 1882)); *see also State v. Taylor*, 995 S.W.2d 78, 85-86 (Tenn. 1999) (holding a trial court has no legal authority to impose a sentence that is contrary to governing law).

The record demonstrates that the sentence "imposed was in direct contravention of a statute . . . [and] is [thus] void and illegal." *See Stephenson*, 28 S.W.3d at 911. Accordingly, we remand this case to the trial court for entry of a corrected judgment reflecting a sentence of life imprisonment, that being the only lawful penalty that could have been entered in 1989. *See Miller*, 584 S.W.2d at 762; *see also Dixon v. Holland*, 70 S.W.3d 22 (Tenn. 2002) (remanding for imposition of a corrected sentence without the necessity of jury sentencing).

³The State concedes in its brief that it cannot determine under which Act the Appellant was sentenced. The trial transcript of the 1989 proceeding reflects that the trial judge instructed the jury "it shall be your duty to find him guilty and set his punishment, which, as provided by law, shall be imprisonment in the penitentiary for life or for a period of time not less than twenty years . . ."

⁴We acknowledge that in 1968 a prisoner serving a life sentence was eligible for parole after serving twenty-five years, less good conduct time, whereas a prisoner serving a ninety-nine-year sentence would be eligible for parole after serving a period of time equal to one half of the sentence imposed. Tenn. Code Ann. §§ 40-3612, -3613.

CONCLUSION

Based upon the foregoing, we hold that the Appellant's seventy-eight-year sentence is void and illegal, and habeas corpus relief is granted. In all other respects, habeas corpus relief is denied. This case is remanded to the trial court for imposition of a sentence of life imprisonment in accordance with the sentencing provisions of the 1915 Act and entry of an amended judgment reflecting the same.

DAVID G. HAYES, JUDGE